STATE OF MICHIGAN
IN THE SUPREME COURT
APPEAL FROM COURT OF APPEALS
Cavanagh, P.J., Sawyer and O'Connell, J.J.

JAMES LITTLE, CHERYL LITTLE, STEVEN RAMSBY, MARY KAVANAUGH, STANLEY W. THOMAS, NANCY G. THOMAS, MICHAEL & GLADYS McCLUSKEY, and ANN SKOGLUND,

Plaintiffs/Counter-Defendants/
Appellants,

v

BETTY H. HIRSCHMAN,

Defendant/Counter-Plaintiff/Appellee,

and

GERALD W. CARRIER, SALLY ANN CARRIER, JOHN P. VIAU, and GENEVIEVE GUENTHER VIAU,

Defendants/Counter-Plaintiffs,

and

FRANCIS J. VANANTWERP, ELIZABETH VANANTWERP, MASON F. SHOUDER, and JEAN ANN SHOUDER,

Defendants.
_____/

Supreme Court No. 121836

Court of Appeals No. 227751

Cheboygan Circuit Court
No. 98-006480-CH

MICHIGAN DEPARTMENT OF CONSUMER AND INDUSTRY SERVICES' AMICUS CURIAE BRIEF

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QUESTIONS PRESENTED FOR REVIEW

I. **Do lot owners possess rights in the nature of easements to those common areas in the plat that are intended for their private use, just as lot owners possess easement rights in common areas that are dedicated to public use?**

II. **If a dedication for private use is a legal nullity, should the court consider the intent of the proprietor and the expectations of lot owners and declare the dedication to be one for public use?**

III. **Did the Auditor General have the statutory authority in 1913 to approve a plat which contained a private dedication?**

STATEMENT OF PROCEEDINGS AND FACTS

In 1885, the function of reviewing and approving plats in Michigan shifted from county Register of Deeds to the Auditor General. Hundreds of the plats approved by the Auditor General as conforming to 1839 PA 91 contain dedications or reservations of land for the use of less than the general public. Many of those plats approved under 1839 PA 91 have been before this Court, and rights of the lot owners to the usage of land valued by them have been upheld.

ARGUMENT

I. The Court of Appeals concluded erroneously that lot owners have no rights in land dedicated for their exclusive use.

A. Standard of Review

Whether the rights of lot owners to private dedications differ from the rights of lot owners to public dedications is a question of law. Questions of law are reviewed *de novo*. *Danse Corp v Madison Heights*, 466 Mich 175, 177-178; 644 NW2d 721 (2002).

B. The Scope of the Dedication Dictates the Rights of Lot Owners

The proprietors of the plat of Ye-Qua-Ga-Mak created parks along the shore of Mullett Lake and the Cheboygan River for the purpose of providing access to those waters for the benefit of the owners of the lots. *Schurtz v Wescott*, 286 Mich 691; 282 NW 870 (1938), involved a similar plat, which was also approved by the Auditor General under 1839 PA 91, with private parks on the waterfront. Schurtz claimed title to the parks and the right to control their use. The Court affirmed the trial court's decision that the lot owners have a right to use the parks, noting:

> The making and recording of the plat, the sale of lots, the use of the streets and parks by the lot owners for a great many years estops appellant Schurtz from now claiming exclusive rights in the parks and streets. [286 Mich at 697.]

Thies v Howland, 424 Mich 282; 380 NW2d 463 (1985), is another plat approved by the Auditor General under 1839 PA 91. That plat was approved in 1907 and, like the plat in *Schurtz*, contains a dedication of land for use of the lot owners. The dedication was held to have granted an easement to all subdivision lot owners:

> The question is whether the plat's dedication of the walk "to the joint use of all the owners of the plat" was intended to convey a fee in the walk to all subdivision owners or merely granted them an easement along the lakeshore. The intent of the plattors must be determined from the language they used and the surrounding circumstances. *Bang v Forman*, 244 Mich 571, 576; 222 NW 96 (1928). 4

> Tiffany, Real Property (3d ed), § 977, p 89. The trial court found that the walk was merely an easement and that plaintiffs owned the fee in that portion of the walk that ran in front of their lots. This finding is not clearly erroneous. [424 Mich at 293.]

In *Walker v Bennett*, 111 Mich App 40; 315 NW2d 142 (1981), a 1956 plat contained a private drive. In describing the rights of lot owners to the drive, the Court of Appeals stated:

> We further point out that a purchaser of platted lands, when the plat is recorded, receives not only the interest described in the deed, but also whatever rights are indicated in the plat of the land. *Kirchen v Remenga*, 291 Mich 94; 288 NW 344 (1939), *Fry v Kaiser*, 60 Mich App 574; 232 NW2d 673 (1975).
>
> No public rights are involved in this case as the roads and walkways were never dedicated to the public, but the platting of the land did grant to the owners, including the Walkers and their grantees, a private right which is an easement appurtenant which will not be lost unless abandoned. *Rindone v Corey Community Church*, 335 Mich 311; 55 NW2d 844 (1952), *Kirchen v Remenga, supra.*

The Court of Appeals decision follows the decision in *Martin v Beldean*, 248 Mich App 59; 638 NW2d 142 (2001). The Court of Appeals in *Martin* rejected *Feldman v Monroe Twp Bd,* 51 Mich App 752, 754-755; 216 NW2d 628 (1974), *lv den* 391 Mich 837 (1974), which equated the rights of lot owners to a private dedication with the rights of lot owners to a statutory, public dedication, and rejected its conclusion that rights vest in lot owners to privately dedicated land. The basis for the rejection of *Feldman* is the *Martin* Court's mistaken belief that *Feldman* hinges only on *Kirchen v Remenga*, 291 Mich 94; 288 NW 344 (1939) and *Westveer v Ainsworth*, 279 Mich 580; 273 NW 275 (1937), both of which involved the dedication of land for public use that had not been accepted by public authorities. What the *Martin* Court overlooks is that *Feldman* was cognizant of the *Schurtz* decision regarding the existence of private rights in private dedications and relied on it. In fact, *Kirchen v Remenga* was decided shortly after the Court's decision in *Schurtz* and it also relies on *Schurtz*, as noted in *Feldman*, 91 Mich App at 752, where it quotes from *Kirchen*:

This *Kirchen* Court provides guidance as to the legal theory under which such private dedications occur and of the status of the parties therein, p 108-109; 288 NW 349:

> "The purchasers of lots in the original plat took not only the interest of the grantor in the land described in their respective deeds, but, as an incorporeal hereditament (1 Sheppard's Touchstone [7th Ed] p 91) appurtenant to it, took an easement in the streets, parks and public grounds mentioned and designated in the plat as an implied covenant that subsequent purchasers should be entitled to the same rights. The grantors could not recall this easement and covenant any more than they could recall other parts of the consideration. They added materially to the value of every lot purchased. *Grogan v Town of Hayward*, 4 F 161 [Calif Cir, 1880]. And the rule has been established in this state that such an easement appurtenant to the lots sold is valid and enforceable not only against the plattor of such land, but as against all who hold under the original grantor. *Westveer v Ainsworth*, 279 Mich 580 [273 NW 275 (1937)]; *Schurtz v Wescott*, 286 Mich 691 [282 NW 870 (1938)]; 18 CJ 115."

Thus, the Court of Appeals in *Martin* not only rejects the conclusion in *Feldman* that private rights arise by private dedications, just as private rights arise in unaccepted dedications of land to the public, it also rejects the conclusions in *Schurtz, Thies* and *Walker*. The Court in *Martin* gives no logical basis to differentiate the right of a lot owner to use land dedicated for private use versus the right of a lot owner to use land dedicated for public use. Lot owners in either type of plat are entitled to the use of the common areas laid out and intended by the proprietor for their use. The grantors and purchasers of lots are bound by the terms of the plat as it is an "implied covenant," *Kirchen v Remenga*, 291 Mich at 108-109 and estops them from claiming exclusive rights, *Schurtz v Westcott*, 286 Mich at 697.

The Court of Appeals erred in concluding that lot owners have no proprietary rights in the land dedicated for their use.

II. Even if the dedication for private use failed, it should have been declared a dedication for public use.

A. Standard of Review

Whether a failed private dedication may be salvaged as a public dedication is an equitable determination. Equitable determinations are reviewed *de novo*. *Abner A. Wolf, Inc v Walch*, 385 Mich 253, 266; 188 NW2d 544 (1971).

B. The Court of Appeals Failed to Consider Whether the Dedication Could be Salvaged

Where dedications for private use have failed in the past, the courts have attempted to ascertain the intent of the proprietor, and salvage the dedication. In *Hooker v Grosse Pointe*, 328 Mich 621, 630; 44 NW2d 134 (1950), the Court stated at 630:

> In *Dickerson v. City of Detroit*, 99 Mich 498, we said there are authorities which hold that a dedication for a street with a right reserved in the owner, is a good dedication, but the condition or reservation, if inconsistent with the use for which the dedication is made, is void. In the case at bar the private way in a public street is inconsistent with the uses and purposes of a public street and therefore void. We hold that the west one half of Lakeland avenue as shown on the 1891 plat was dedicated to the public free and clear of any private ways.

Likewise, in *Kraushaur v Bunny Run Realty*, 298 Mich 233; 298 NW 514 (1941), which the Court of Appeals heavily relied upon in *Martin* in reaching its conclusions about the validity of private dedications, the Court held at 242:

> We are of the opinion that the only fair and reasonable construction that can be placed upon the dedication of the drives, roads, and boulevards, laid out in the plat of the Porritt farm, if in fact and in law there was any dedication at all, is that there was a dedication to the general public of the same. It follows that the theory of these plaintiffs on which they seek injunctive relief is not tenable.

The Court of Appeals in *Martin* also relied on *Patrick v Young Men's Christian Ass'n*, 120 Mich 185; 79 NW 208 (1899), involving an 1831 dedication of a church square in a plat.

After concluding that the statutory dedication failed for the reason that the statute was not designed to apply to any dedication other than those for general public purposes, the Court concluded that a valid common law dedication had occurred:

> The plat only serves to show what the owner intended, and to make certain the terms under which the St. Luke's Society erected its buildings and maintained possession, from which the offer ripened into a dedication. It is evidence as an act *in pais* of dedication at common law. *Lessee of Village of Fulton v. Mehrenfeld*, 8 Ohio St. 440. [120 Mich at 197.]

The Court quoted from *Benn v Hatcher*, 81 Va. 25, which involved the dedication of land for a cemetery:

> "In its technical legal sense, dedication is the appropriation of land for a public use, - as for a highway, a common, or the like, - but may be effectual, it seems, when made to a pious or charitable use, though not distinctively a public one." [120 Mich at 191.]

Also see, *Crosby v City of Greenville*, 183 Mich 452; 150 Mich 246 (1914) where a technically deficient plat could still result in a common law dedication of a land for public use.

The Court of Appeals simply disregarded the intent of the proprietors and the expectations of owners of lots in Ye-Qua-Ga-Mak Subdivision who bought their property in reliance on the plat. If the dedication failed because the offer was made to less than the general public, the Court should have determined whether the dedication of the parks should be considered as one for public use as the Supreme Court did in both *Hooker* and *Kraushaar*, or a valid common law dedication as in *Patrick*.

III. The law governing the state's approval of the plat of Ye-Qua-Ga-Mak permitted the dedication of land for private use.

A. Standard of Review

Whether a dedication of land for private use failed under the laws governing the creation of plats is a question of law. Questions of law are reviewed *de novo*. *Danse Corp v Madison Heights*, *supra*.

B. **The Auditor General had authority to approve private dedications**

The creation and vacation of plats is statutory. *Hooker v Grosse Pointe*, 328 Mich 621, 630; 44 NW2d 134 (1950); *Binkley v Asire*, 335 Mich 89, 96; 55 NW2d 742 (1952). The early statutes contemplated the use of plats for the creation of towns with the common areas set aside for public use. 1 Terr Laws § 16; 1839 PA 91. Words of dedication were not required for the streets, alleys and parks since the purpose of the plat was to lay out a community. The use of platting to create residential subdivisions followed, where it was not critical that common areas be open to the general public. Under 1839 PA 91, 1929 PA 172, and 1967 PA 288, the three post-statehood acts governing plats, the dedication or reservation of land in a plat for the private use of the lot owners became common.

Plats recorded in this state since 1839 PA 91 was amended by 1873 PA 108 took effect have been reviewed and approved for conformity with the law by public authorities. Initially, the county's Register of Deeds performed that function, 1873 PA 108, § 1, but it was transferred to the Auditor General in 1885 by 1885 PA 111, § 1 and continued under 1929 PA 172. The State Treasurer now had that role under 1967 PA 288, § 171; MCL 560.171, and by Executive Orders, it has been transferred to the Department of Consumer and Industry Services. 1996-2, MCL 445.2001 and 1980-1, MCL 16.732.

Once reviewed and approved for conformity with the act, the plat is eligible for recording with a Register of Deeds and is considered to be "prima facie evidence" of the making and recording of such map or plat in conformity with the governing statute. 1839 PA 91, as amended by 1873 PA 108, § 1 and 1885 PA 111, § 1; 1929 PA 172, § 251; 1967 PA 288, § 251; MCL 560.251.

Various plats approved by the Auditor General under 1839 PA 91 that contain private dedications or reservations have been before this Court. In *Lever v Grant*, 139 Mich 273, 275; 102 NW 848 (1905), an 1885 plat reserved a street as a private way for the lot owners:

> "And we do hereby dedicate to the perpetual use of the public the streets and alleys as shown thereon, reserving to ourselves, our heirs and assigns, the reversion or reversions thereof whenever discontinued by law, excepting the north 30 feet of Custer avenue, which we reserve as a private right of way. Witness, etc."

See also, *Detroit v Myers*, 152 Mich 666; 116 NW 620 (1908) (same plat and private way). In *Schurtz v Wescott*, 286 Mich 691; 282 NW 870 (1938), a 1891 plat dedicated the streets to the public, but not the parks on Diamond Lake. A 1925 plat containing private roads was before the Court in *Minnis v Jyleen*, 333 Mich 447; 53 NW2d 328 (1952). *R.R. Improvement Ass'n v Thomas*, 374 Mich 175, 178; 131 NW2d 920 (1965) involved a 1924 plat with roads dedicated "to the owners of lots in said subdivision." In *Thies v Howland*, 424 Mich 282; 380 NW2d 463 (1985), a 1907 plat dedicated land for the joint use of all owners in the plat. *Hooker v Grosse Pointe, supra*, involved an 1891 plat.

According to the Court in *Leonard-Hillger Land Co v Wayne Co Bd of Auditors*, 203 Mich 466, 467; 169 NW 850 (1918), 1915 CL § 3350 allowed private streets in plats. The language quoted by the Court in *Leonard-Hillger* comes from 1915 PA 251, § 1.

By 1925 PA 360, § 1, 1839 PA 91 was further amended to require words of dedication on a plat, and clearly provided the proprietor the option of creating private roads, parks, and other places:

> [S]aid maps or plats shall also particularly set forth and describe all the public grounds,...*all roads or streets, which are not dedicated to public use, shown in said plat shall be marked "private roads."*....There shall be printed on said plat a form of dedication, stating the name of plat, that the lands embraced in said plat have been surveyed and platted and that the public streets, alleys and other public places shown on said plat are dedicated to the use of the public, *and if there be*

any street, park, or other places which are usually public but are not so dedicated on said plat the character and extent of the dedication of such street, park or other public place shall be plainly set forth in said dedication. [Emphasis added.]

When the plat of Ye-Qua-Ga-Mak was approved in 1913, 1897 CL 373 did not specifically reference private dedications as it would by subsequent amendments referenced earlier. The Auditor General obviously believed that 1839 PA 91 permitted land to be reserved or dedicated for the use of lot owners.

Two rules of statutory construction are particularly pertinent. The first rule is that statutes governing plats must be read "in context with the entire act, and the words and phrases used there must be assigned such meanings as are in harmony with the whole of the statute, construed in the light of history and common sense." *Arrowhead v Livingston Road Commission*, 413 Mich 505, 516; 322 NW2d 702 (1982). The second rule is that the "practical construction given to doubtful or obscure laws in their administration by public officers and departments with a duty to perform under them is taken note of by the courts as an aiding element to be given great weight and construing such laws and as sometimes deferred to when not in conflict with the indicated spirit and purpose of the legislature." *Owosso Board of Education v Goodrich*, 208 Mich 646, 652; 175 NW 1009 (1920).

By 1913, the Auditor General would have observed that dedications of land for public use do not automatically vest the fee in the local unit of government as the statute contemplated, but that an act of acceptance by public officials must occur for the dedication to become complete, i.e., *Wayne County v Miller*, 31 Mich 447 (1875). Yet, despite the lack of acceptance by public officials of the dedications, the dedicated streets and parks remain lawfully available for the private use of the lot owners. See, *Smith v Lock*, 18 Mich 56 (1869). A literal interpretation of the statute was not employed by the court in *Wayne County v Miller*, could then a common sense approach to the act lead the Auditor General to the conclusion that private

dedications were not contrary to the act, since lot owners possess private rights in the dedicated lands? Could the Auditor General conclude that private dedications do not conflict with the spirit and purpose of 1839 PA 91, where the towns and cities had been platted and property development had shifted to residential subdivisions where general public access was not essential to their function?

Plats approved under 1839 PA 91 were believed to conform to the law and have been subsequently relied on by thousands of lot owners who acquired their property with reference to the recorded plat. To declare private dedications a nullity serves no public purpose.

RELIEF SOUGHT

Amicus Curiae Michigan Department of Consumer and Industry Services requests this Court to reverse the Court of Appeals' decision and affirm the trial court's opinion.

Respectfully submitted,

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